

Wag The Dog:

Will Private Companies Reshape Higher Education in Their Image?

A Confidential Agreement Between UCLA and The Home Education Network Raises Disturbing Questions About Campus Commercialization

(c) by David F. Noble

Controversy is mounting over the high tech commercialization of higher education, but thus far it has only scratched the surface of the challenges facing academia. In recent weeks the campuses of California State University, the nation's largest state university system, erupted in protest over a proposed deal that would give a consortium of Microsoft, GTE, Hughes, and Fujitsu exclusive rights to develop, and profit from, the system's technological infrastructure. In the face of demonstrations, public hearings, and media exposure, the CSU has delayed finalizing the agreement until March and there are some indications that it might ultimately fall through. In the meantime, however, a far more explosive issue is about to ignite.

Whereas the CSU deal entails control over infrastructure, the far more profound matter is the commoditization of instruction, the conversion of the fundamental process of education itself - the heart and soul of any educational institution - into commercial products to be owned, bought, and sold in the global marketplace. In the past few years universities have entered into various agreements with private firms which give those for-profit companies exclusive rights to package and electronically distribute university courses. CSU has an arrangement with Simon and Schuster, the University of California at Berkeley has one with America on Line, UCLA has an agreement with the Home Education Network, and a

number of universities have deals with Real Education (sic). Thus far the detailed nature of these arrangements have escaped scrutiny and their implications for higher education - in particular the role and rights of faculty - have barely been discussed. This author has obtained a copy of the confidential agreement between UCLA and the Home Education Network. A careful reading of this heretofore secret document illuminates both the intentions and the implications of such arrangements and suggests that this new commercial tail of higher education might well end up wagging the dog.

The Home Education Network (THEN) emerged not from the world of education but from the fast hustle media world of spins and sound-bites, cable TV and public relations. It was the brainchild of political media consultant and television producer Alan Arkatov, who produced and marketed the media campaigns of over a dozen U.S. senators, governors, and mayors, before serving as Senior Advisor to President Clinton's 1992 campaign chairman Mickey Kantor. In 1994 he negotiated a landmark contract with the Regents of the University of California to form an unprecedented arrangement with UCLA Extension (UNEX), the largest continuing higher education program in the country. The agreement gave Arkatov exclusive rights to all electronic delivery of UNEX courses and the exclusive use of the UCLA name for that purpose, thereby launching THEN as "the most comprehensive continuing distance learning program of its kind in the United States." Well connected politically, Arkatov was appointed to the Telecommunications Advisory Board of the State of California and the Board of the California Postsecondary Education Commission and remains THEN Chairman of the Board.

THEN is now directed by its President and CEO John Kobara, who comes out of the cable television industry and the public relations and marketing

side of academia. A UCLA graduate, Kobara was vice president and general manager of Falcon TV, one of the nation's largest independent cable operators, and served as president of the Southern California Cable Association before returning to UCLA to direct the Alumni Association. By the time he joined THEN in 1997, Kobara was UCLA's Vice Chancellor of University Relations directing all of the university's public relations, marketing, and government and alumni relations activities. Combining their media experience, political influence, and insider knowledge of UCLA and its myriad community connections, Arkatov and Kobara were well placed to make the most profitable use of their ambitious arrangement with UCLA. But UCLA administrators, meanwhile, had ambitions of their own, not only to provide a new revenue stream for UNEX but to establish it, and UCLA, as the premier vehicle for distance learning in the University of California system, and beyond.

The extremely broad June, 1994 agreement between THEN (signed by Arkatov) and the Regents of the University of California (on behalf of UNEX, a part of the Division of Continuing Education of UCLA, signed by Robert Lapiner, UCLA Dean of Continuing Studies) granted to THEN the exclusive right to produce, for a ten year "production period", and exploit, in perpetuity, all electronic versions of UNEX courses: "the sole, exclusive and irrevocable right under copyright and otherwise to make, produce and copyright by any means or 'Technology,' as such term is hereinafter defined, now known or hereafter devised during the 'Production Period', as such term is hereinafter defined, audio, visual, audi/visual, digital and/or other recordings of all UNEX classes. . ." as well as "the sole, exclusive and irrevocable right under copyright and otherwise to exhibit, perform, broadcast, transmit, publish, reproduce, manufacture, distribute, advertise, sell, rent, lease, market, publicize, promote, merchandise,

provide technical support for, license and otherwise exploit, generally deal in and with and turn to account the Recordings by all means and technology and in all media and forms of expression and communication now known or later developed in all languages throughout the universe (the 'Territory') in perpetuity. . . ." THEN also secured the right to use the "University of California" and "UCLA" names in connection with the exploitation of their rights granted in the Agreement, as well as the right to assign or transfer their interests in the agreement to "any entity."

In consideration of this generous grant of rights, UNEX would receive a percentage of THEN's gross receipts (increasing from 6 to 12 percent over the course of the term) plus reimbursement of expenses incurred in the preparation of courses, including materials and wages. UNEX retained the right to designate which courses would and would not be converted to electronic form and the right to final approval of their content. However, it agreed that "THEN shall have the unlimited right to vary, change, alter, modify, add to and/or delete from the Recordings, and to rearrange and/or transpose the Recording and change the sequence thereof." In 1995 there was apparently some difference of opinion between the parties over whether or not the 1994 agreement covered online and Internet delivery of courses. THEN insisted that it did and ultimately prevailed upon UCLA to formally amend the agreement, in February, 1996, to the effect that "UNEX and THEN acknowledge that the inclusion of On-Line Rights is on the same economic and other terms as pertain to Recordings in the Agreement and that all such terms shall be interpreted so as to encompass On-Line Rights." According to both John Kobara of THEN and UCLA's Associate Dean of Continuing Education and UCLA Extension David Menninger, the parties are in the process of renegotiating some of the terms of the original agreement to better fit the case of online delivery of courses.

If the THEN-UCLA agreement brought the pecuniary preoccupations of private commerce into the heart and soul of higher education, it also carried with it another characteristic aspect of proprietary enterprise: secrecy. Despite, or perhaps because of, the broad terms and far-reaching implications of their agreement, THEN officials and UCLA administrators formally agreed to keep it secret. In a confidentiality clause in the 1994 agreement, it was agreed that "except as required by law, UNEX shall hold in confidence and shall not disclose or reveal to any person or entity confidential information relating to the nature and substance of this Agreement. . ." and that any participating "Instructor shall hold in confidence and not disclose or reveal to any person or entity confidential information relating to the nature and substance of the agreement between UNEX and THEN. . ." When I attempted to obtain a copy of the agreement from John Kobara, I was refused on the grounds that THEN is a private company and does not have to make such disclosures. When I made the request of UCLA's David Menninger I was refused on the grounds that the agreement contained a confidentiality clause. I was finally given a copy by Menninger but only after making a formal case in writing and intimating that I was prepared to take legal action to get it. While THEN clearly had time-honored proprietary motives for such confidentiality, why did UCLA administrators, trustees of a public institution trading in publicly-created goods, agree to such secrecy? What did the university have to hide? Perhaps it was what the agreement had to say about its larger ambitions, and, especially, its relations with faculty.

Kobara's spin is that this arrangement is a modest one, restricted to UNEX and thus without any significance, or any reason for concern, beyond it. He insists that THEN has no relationship with UCLA but only with UNEX,

which he argues is an independent entity. This is not the case. While UNEX is self-supporting, it is unambiguously a part of UCLA, as the Agreement itself makes clear. It is for this reason that an officer of UCLA, Robert Lapiner, signed the agreement, representing the Regents. Moreover, Kobara's modesty is forcefully belied by the Agreement, which betrays intentions of a much wider scope. According to the Agreement, "The parties contemplate that the relationship with THEN may extend to other University of California campuses. Because of UNEX's unique responsibility to be bound to THEN for the Term hereof, THEN agrees that the participation of all other University of California campuses as well as other academic units of UCLA in this project will be coordinated by UNEX and for the purposes of this Agreement shall be considered 'UNEX Classes.' An appropriate share of revenues otherwise payable to UNEX for any such courses shall, however, be distributed proportionately to the participating University of California campus or other academic unit of UCLA." Howevermuch they have been able to realize their grand vision, it is clear that UCLA from the outset intended to extend its distance education operations beyond UNEX and, through UNEX - the largest continuing education program in the UC system - beyond UCLA to other UC campuses. While David Menninger denies that any such plans have come to fruition, John Kobara acknowledges that some regular UCLA faculty have become involved with THEN for possible test-marketing of online courses. This Fall the UCLA Division of Letters and Science launched its Instructional Enhancement Initiative mandating that every course must have a website containing course outlines and assignments and encouraging faculty to put their lectures and other materials online as well. Kobara and Menninger insist that there is no connection whatever between this unprecedented initiative and their activities. Reading the Agreement, one has to wonder.

As is typical in any such agreement, the parties have to attest to the fact that they indeed have the power to grant whatever it is they are granting. Thus, UNEX affirmed that "UNEX has the full right, power, and authority to enter into and perform this Agreement and to grant to and vest in THEN all rights herein set forth, free and clear of any and all claims, rights, and obligations whatsoever." Under this assumption, UNEX agreed that "As between UNEX, THEN, and the instructors of the UNEX Classes (the 'Instructors'), THEN shall be the owner of all right, title, and interest, including without limitation, the copyright, in and to all Recordings of UNEX Classes produced by and for THEN hereunder and, for purposes of Title 17 of the United States Code also known as the Copyright Act of 1976, as amended (the 'Copyright Act'), THEN shall be deemed the author of the Recordings." Under what authority could UNEX make such a grant, given the fact that the instructors who create the courses might have some interest in the matter? This is the crux of the Agreement and all such arrangements, and raises the issue of intellectual property rights which has become perhaps the central concern of faculty and their organizations in the wake of the commoditization of instruction.

The solution to UNEX's problem was solved in the Agreement by the inclusion of a compulsory "Instructors' Agreement," whereby instructors would be made to surrender their rights to copyright to UNEX and the Regents as a condition of employment. This is analogous to the practice of corporations since the turn of the century, and universities more recently, whereby employees must contractually surrender their patent rights to their employer as a condition of employment. According to the Agreement, "UNEX shall use its best efforts to cause each Instructor to agree in writing ('Instructor Agreement') for the specific stated benefit of THEN, to the provisions set forth on Exhibit 'A' attached hereto." Thus UNEX

agreed to compel its instructors (and, by extension, as we have seen, potentially teachers in other academic units and campuses as well), on THEN's behalf, to give up their legal rights to copyright protection of their work. Moreover, any such Instructor Agreement between instructors and UNEX had to meet the specifications of THEN; according to the Agreement, "THEN shall have the right of prior written approval of the form and substance of the agreements entered into by UNEX and Instructors concerning the production and exploitation of the Recordings."

Exhibit A is a five page specification of what exactly the Instructor must give up and do for UNEX and THEN in order for UNEX to meet its contractual obligations to THEN. Thus, the Instructor must agree to grant to UNEX the same rights granted by UNEX to THEN, namely "the sole, exclusive and irrevocable right under copyright and otherwise to make, produce andcopyright by any means or technology now known or hereafter devised Recordings of all UNEX Classes taught by Instructor" as well as "the sole, exclusive and irrevocable right under copyright and otherwise to exhibit, perform, broadcast, transmit, publish, reproduce, manufacture, distribute, advertise, sell, rent, lease, market, publicize, promote, merchandise, provide technical support for, license and otherwise exploit, generally deal in and with and turn to account the Recordings by all means and technology and in all media and forms of expression and communication now known or later developed in all languages throughout the Territory in perpetuity." The Instructor must acknowledge and agree that "THEN shall be deemed the author of the Recordings" and that the "Instructor has no rights of any kind or nature in the Recordings of UNEX Classes taught by the Instructor;" and must "forever waive any right to assert any rule, law, decree, judicial decision or administrative order of any kind throughout the world, which allows Instructor any right in the moral rights (droit moral) in the Recordings."

Exhibit A stipulates that the "Instructor must not permit the Course Materials utilized by the Instructor for UNEX Classes taught during the Production Period to be recorded by any Technology, except by THEN" unless it is approved by THEN or is restricted to publication in print form on paper (e.g. books). The Instructor is also obligated to assist UNEX and THEN in securing releases to all copyrighted material used in the Instructor's course. And just as UNEX must use its best efforts to cause the Instructor to sign the Instructor Agreement, so the "Instructor shall use Instructor's best efforts to cause all guest lecturers taking part in UNEX Classes taught by such Instructor to execute agreements approved by UNEX and THEN that are consistent with the balance of the provisions of Exhibit A." Finally, the Instructor is required to execute any other documents consistent with the terms of the Instructor Agreement, as requested by UNEX or THEN, and if the Instructor fails to do so, "the Instructor shall be deemed to have appointed UNEX and/or THEN as Instructor's irrevocable attorney-in-fact with full power of substitution and delegation and with full and complete right and authority . . . to perform such acts and take such proceedings in the name of Instructor. . ." The Instructor Agreement brought down upon the Instructor a new regime of proprietary control, commercial calculation, and secrecy, and offered nothing in return. Would such additional documents require also that course design and content conform to the demands of the technology and the market?

The Instructor Agreement, a formal written contract between employee and employer in which employee rights are legally transferred to the employer, was seen by the parties in 1994 as the way UNEX would secure the power and authority required to comply with its Agreement with THEN, at the expense of the Instructors. Today both parties contend that such Instructor Agreements are no longer necessary, given the shift

to online delivery of all of THEN offerings. According to the terms of a revised agreement, they argue, which has not yet been finalized, the actual ownership of electronic courses would reside solely with UNEX while THEN would merely have exclusive rights of distribution. Moreover, now UNEX maintains that their ownership rights would be automatic and would not require any formal contract with their employees. As David Menninger, UCLA's Associate Dean of Continuing Education and UCLA Extension, explained to me in a letter in December, 1997, "since the focus of the Extension/THEN relationship has shifted to Extension online courses, for which the Regents of the University of California retain ownership, no such instructor's agreement has ever been used, nor is any further need anticipated."

It is not clear upon what legal basis Menninger asserts his claim that the Regents of the University of California retain ownership, given the substantial contribution of the Instructors to these courses. According to Kathy Whennouth, technology transfer specialist in the University of California's President's Office, the University does not yet have any policy on the copyright of online course materials. Typically, ownership follows authorship, and this would probably be the case here too, perhaps allowing also for a university interest because of the use of the university name and resources. But the matter is far from settled, and is sure to be controversial. Now that the UNEX/THEN Agreement has finally seen the light of day, it will no doubt become a focus of such controversy.

Is it legally binding? Will it withstand a legal challenge? Time will tell.

THEN is lagging behind expectations. According to the Agreement, it is required to return at least two million dollars in revenues to UNEX by the summer of 1999. As of now this appears extremely unlikely and the parties are renegotiating to keep the deal alive. But whatever the fate of

THEN, or the ultimate legal status of the Agreement, this episode sheds much light upon the methods, intentions, and visions of those involved in the commoditization and commercialization of university instruction. It should serve to alert those who have heretofore been deliberately excluded from knowing about, shaping, or benefitting from such arrangements - faculty, students, and the taxpaying public - that there is a real danger here to the future integrity of our public institutions of higher education.

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